Filed 10/4/10 P. v. Nelson CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ERNEST NELSON, Defendant and Appellant.	B216981 (Los Angeles County Super. Ct. No. BA331871)

APPEAL from a judgment of the Superior Court of Los Angeles County, Curtis B. Rappe, Judge. Affirmed.

Leonard J. Klaif, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Roberta L. Davis and Tita Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

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This appeal arises from a criminal prosecution involving a years-long course of grand theft from the Willed Body Program (WBP) at the University of California at Los Angeles (UCLA) School of Medicine. Defendant's sole contention on appeal is that the trial court's instructions on an allegation pursuant to the "aggravated white collar crime enhancement" (Pen. Code, § 186.11, subd. (a))[1] were infected with reversible error. A finding under the enhancement requires a determination of the value of stolen property, and the trial court instructed the jury on the "fair market value" test normally applied to determine the value of stolen property. We are not persuaded to reverse the jury's finding on the aggravated white collar crime enhancement allegation.

FACTS

At all relevant times, the WBP received donated bodies from persons who willed their remains to UCLA for medical education and research. The WBP's primary purpose was to provide cadaveric materials for teaching anatomy to first-year medical students at the university's medical school, but it also served teaching needs for surgical residents at the university's medical center. Although the WBP was not intended to generate income from donated bodies, the WBP did supply cadaveric materials for money to outside companies and institutions for their teaching or research needs. The WBP's procedures required such an outsider to submit a requisition form specifying the desired cadaveric materials and to execute an agreement for those materials. The WBP, in turn, filled out an invoice with the charges for the "preparation" of the requested materials. The charges for the materials were determined by referencing an established price list. The WBP's usual charge for a whole dead body was in the range of $800.[2]

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[1] All further section references are to the Penal Code.

[2] The trial record in this case discloses a certain murkiness surrounding the persons, companies, institutions and transactions involved in the arena of dead bodies and body parts. Because the *sale* of dead bodies and body parts is unlawful, the trial record is rife with evidence showing it was the mutual "understanding" of various participants that the transactions involving dead bodies or body parts did not involve direct payments for the cadaveric materials, but rather, involved payments to the supplier for "services," such as storing, preparing, and transporting the materials.

In 1997, UCLA hired Henry Reid as the WBP's director. Reid was a defendant in the current criminal case at one time but is not involved in the current appeal. Defendant Ernest Nelson — who was not employed by UCLA — operated "Empire Anatomical," a company that supplied bodies and body parts to a number of companies and institutions including, among others, Mitek, Inc., NuVasive, Inc., MCJ Consulting, the Kerlan-Jobe Orthopaedic Foundation, New England Baptist Hospital, DJ Ortho, Inc., the University of Utah, Rhode Island Hospital, Arthrex, Inc., Biomet, Inc. and Linvatech Corporation, all of whom paid money to Nelson in exchange for the cadaveric materials. Nelson's clients paid varying sums for dead bodies and body parts. MCJ, for example, paid $2,100 for a "cut up part" of a cadaver, "[n]ever a full cadaver," the University of Utah paid $2,400 for "each" cadaver, and NuVasive paid $2,100 "per [eviscerated] torso." Nelson's clients also paid Nelson for specific body parts such as knees, shoulders and spines.

Beginning sometime in 1999, and continuing through early 2004, Reid supplied Nelson with bodies and body parts from the WBP, outside the WBP's normal anatomical material requisition and agreement procedures. Nelson, in turn, supplied bodies and body parts stolen from the WBP to his clients. Between 1999 and 2003, Nelson received $1.5 million (rounded) for bodies and body parts. Nelson did not pay any money to the WBP; he did pay $84,000 to Reid in the same time frame. During the period between August and October 2001, Nelson received $16,800 from NuVasive in exchange for cadaveric material which NuVasive later quarantined and returned due to false serology reports. Nelson never returned any part of the $16,800 that he received from NuVasive.

In May 2008, the People filed an indictment against Nelson arising from the events at the WBP. On January 15, 2009, the People filed an amended indictment accusing Nelson of conspiracy to commit grand theft (count 1), grand theft from the WBP by an employee (count 2), and grand theft by false pretenses of $16,800 from NuVasive (count 3), each with an attendant allegation pursuant to the former language of section 12022.6, subdivision (a)(3), that the property taken, damaged or destroyed exceeded $1 million in value. Counts 4 through 8 charged Nelson with filing false tax returns for the years 1999 to 2003, respectively.

In addition to the substantive offenses and section 12022.6 enhancements noted above, the indictment further alleged, in accord with section 186.11, subdivision (a)(2), that the offenses alleged in counts 1, 2, and 3 were related felonies, a material element of which was fraud and embezzlement, which involved a pattern of related felony conduct, and that the pattern of related felony conduct involved the taking of more than $500,000.

In April and May 2009, the indictment against Nelson was tried to a jury, at which time the People presented evidence establishing the facts summarized above. Additional evidence showed that Nelson had underreported his income from 1999 through 2003 by more than $900,000. At the close of evidence, the trial court expressly instructed the jury that Nelson could be found guilty in three ways: as a perpetrator, or as an aider and abettor, or as part of a conspiracy. The court instructed the jury that Nelson was being prosecuted in count 3 (grand theft from NuVasive) under only a theory of theft by false pretense; the court instructed the jury that Nelson was being prosecuted for theft in count 2 (grand theft from the WBP) under two theories, namely, grand theft by an employee or agent and grand theft by embezzlement. With regard to count 2, the trial court instructed the jury that the People were required to prove that Reid was an employee of the WBP and that Nelson had conspired with Reid or aided and abetted Reid "who committed theft of property" from the WBP.

On May 14, 2009, the jury returned verdicts finding Nelson guilty of all eight counts. As to counts 1 (conspiracy to commit grand theft) and 2 (grand theft from the WBP), the jury did not return a finding on the attached allegation under section 12022.6, subdivision (a)(3), that the value of the property taken exceeded $1 million. As to count 3 (grand theft by false pretenses from NuVasive), the jury found the attendant allegation under section 12022.6, subdivision (a)(3), that the value of the property taken exceeded $1 million was "not true." On a separate verdict sheet, the jury found that the allegation pursuant to section 186.11, subdivision (a)(2), that the felony conduct alleged in counts 1, 2 and 3 was related and involved a pattern of felony conduct involving the taking of more than $500,000, was "true."

On June 11, 2009, the trial court sentenced Nelson to state prison for an aggregate term of 10 years. Nelson's sentence includes a three-year midterm based upon the jury's finding pursuant to section 186.11, subdivision (a)(2).

Nelson filed a timely notice of appeal.

DISCUSSION

Nelson contends the trial court's instructions on the aggravated white collar crime enhancement were insufficient because they "did not instruct the jury with how to make an evaluation of the value of the property taken with respect to this enhancement." The instructional omission, maintains Nelson, created an error of constitutional magnitude in that it deprived him of his right to a trial by jury and due process. We disagree.

A. The Aggravated White Collar Crime Enhancement Statute

Section 186.11, subdivision (a)(1), provides that any person who commits two or more related felonies, a material element of which is fraud or embezzlement, and which involve a pattern of related felony conduct, shall be punished by a consecutive sentence enhancement. Under subdivision (a)(2), the person shall be punished by a term of two, three or five years where the pattern of related felony conduct "involves the taking of, or results in the loss by another person or entity of, more than [$500,000] . . . ."[3]

B. Valuing Loss

Section 484 defines theft. Section 487 defines grand theft as any theft when the money, labor, or real or personal property taken is of a value exceeding $400. Section 484, subdivision (a), provides: "In determining the value of the property obtained, for purposes of this section, the reasonable and fair market value shall be the test . . . ." Section 484 does not define "fair market value." CALCRIM No. 1801 defines

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[3] Under section 186.11, subdivision (a)(3), the person shall be punished by the terms specified in section 12022.6, subdivision (a)(1) or (a)(2), which are one and two years respectively, where the pattern of related felony conduct "involves the taking of, or results in the loss by another person or entity of, more than [$100,000] . . . ." Nelson's jury was not instructed on this lower threshold.

the fair market value of property as "the highest price the property would reasonably have sold for in the open market at the time of, and in the general location of, the theft."

Section 12022.6 prescribes an additional term of punishment when a person takes, damages, or destroys property in the commission or attempted commission of any felony, with the intent to cause that taking, damage, or destruction. During the time that Nelson committed his continuing grand theft offense between 1999 and 2004, former section 12022.6, subdivision (a)(3) prescribed an additional term of three years when the taking, damaging or destruction of property from a felony exceeded $1 million.[4] Although section 12022.6 did not at any time between 1999 and 2004, and does not now, provide an explanation for how to determine whether a taking, damaging or destruction of property exceeded the $1 million threshold, case law clarifies that such a determination is the same as it is under sections 484 and 487. (See, e.g., *People v. Swanson* (1983) 142 Cal.App.3d 104, 107.) In short, at all times applicable to Nelson's case, fair market value was the test for determining whether a taking, damaging or destruction of property exceeded $1 million within the meaning of section 12022.6.

Neither party has cited a case which directly addresses the issue of the proper test for determining whether a taking or loss of stolen property within the meaning of section 186.11, subdivision (a)(2), exceeds $500,000, but we agree with Nelson that it is logical to apply the reasoning set forth in *People v. Swanson*, *supra*, 142 Cal.App.3d 104, and that this leads to the conclusion that a taking or loss within the meaning of section 186.11, as a general rule, is also the same as it is under the theft statutes, i.e., the fair market value test.

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[4] Under former section 12022.6, subdivision (a)(1), the additional term was one year when the loss from a felony exceeded $50,000, and, under subdivision (a)(2), the additional term was two years when the loss from a felony exceeded $150,000. It appears that Nelson's jury was not instructed on these lower thresholds. Section 12022.6, subdivisions (a)(1), (a)(2) and (a)(3), were amended in 2007 to raise their stated threshold values. (Stats. 2007, ch. 420, § 1.)

C. The Trial Court's Valuation Instructions

The trial court instructed the jury on valuation in two contexts. Initially, the court instructed the jury — in connection with the crime of grand theft — that Nelson committed grand theft if he stole property worth more than $400. The court further instructed: "The value of property is the fair market value of the property. [¶] Fair market value is the highest price the property would reasonably have been sold for in the open market at the time of, and in the general location of, the theft." Later, the trial court instructed the jury — in connection with the enhancement allegations pursuant to section 12022.6, subdivision (c)(3), ancillary to counts 1, 2 and 3 — that the People were required to prove the value of property taken was more than $1 million, and that "[t]he value of property is the fair market value of the property."

In connection with the aggravated white collar crime enhancement, the trial court instructed the jury that the People were required to prove a pattern of related felony conduct that involved the taking of or resulted in the loss by another person or entity of more than $500,000. The court further instructed the jury: "In determining the total amount of the taking or resulting loss, you may not count a specific taking or resulting loss more than once even if that specific taking or resulting loss is involved in multiple counts." The trial court did not instruct the jurors — in connection with the aggravated white collar crime enhancement — with language to the effect that "the value of property is the fair market value of the property."

On May 12, 2009, the jury began deliberating at 2:50 p.m. and adjourned for the evening recess at 4:00 p.m. On May 13, 2009, the jury began deliberating again at 8:35 a.m. At 1:55 p.m., the jury advised the trial court that they had a question, and, at 2:20 p.m., the trial court and the lawyers met via a conference call, at which time the court indicated that the jury had submitted this question: "Definition of fair market value. Does this fair market value pertain to UCLA or Ernest Nelson." The court advised the lawyers that it intended to answer the question with the following answer: "As stated in [CALCRIM No.] 1801, fair market value is the highest price the property would have reasonably been sold for in the open market at the time of and in the general

location of the theft." When the prosecutor stated that she thought the court should further comment that fair market value related to what Nelson had received for the bodies and body parts, and not the price that UCLA normally charged to outsiders, the court responded that it believed such a comment would involve a factual matter more suitable to argument than instructions. Everyone, including Nelson's counsel, agreed to the court's proposed answer referring the jurors to its prior instruction on fair market value. The jury adjourned on May 13, 2009, at 3:35 p.m.

On May 14, 2009, at about 9:00 a.m., the jury indicated it had reached "verdicts on everything except the — as [they] call it the second parts of counts one and two," plainly referring to the section 12022.6, subdivision (a)(3), enhancements attached to counts 1 and 2. At 9:10 a.m., the trial court allowed counsel to reopen argument as to the section 12022.6, subdivision (a)(3), enhancements. During his supplemental argument, Nelson's counsel proffered that the loss should not be viewed as the cadaveric material itself, but as the money that Reid failed to forward to UCLA for the cadaveric material. He argued the UCLA's loss was $800, and that there was no way to know how many cadavers UCLA had actually lost.

At 10:00 a.m., the jury resumed deliberations. At 10:40 a.m., the jury indicated that it had reached a verdict. Shortly thereafter, the jury returned its verdicts as outlined above.

D. Analysis

As an initial matter, we agree with Nelson that any error in not repeating the fair market value test instruction in connection with the enhancement allegation pursuant to section 186.11 must be viewed as harmless. Although the trial court did not instruct the jury in connection with the section 186.11 enhancement allegation with language to the effect that the value of taken or lost property is the fair market value of the property, the court twice instructed the jury that the test for value was the fair market value test — first, in connection with the crime of grand theft, and, second, in connection with the enhancement allegations pursuant to the section 12022.6, subdivision (c)(3). As Nelson

himself recognizes "it is likely that the jury would have applied the same method of valuing loss under both enhancement statutes."

This leaves Nelson's more substantive argument "that under the circumstances of this case" the failure to give more specific "fair market value" instructions was error, as was instructing the jury that fair market value was the *highest* price for which property reasonably would have sold in the open market. (See CALCRIM No. 1801.) We agree with the People's argument that Nelson has waived his former claim because he did not request any clarifying or amplifying language at his trial. (See *People v. Guiuan* (1998) 18 Cal.4th 558, 570.) Here, Nelson expressly agreed during trial that the standard instruction on valuing loss was appropriate. He should not now be allowed to turn around for the first time on appeal and contend that the trial court erred by giving the very instructions he agreed to. Accordingly, we find any claim of error he now sets forth to have been forfeited.

But even if we were to consider his legal argument, we do not find it requires reversal of the enhancement. Nelson argues the standard fair market value test instructions were inadequate in the unique circumstances presented by his case. We understand Nelson to be arguing that the trial court's instructions allowed the jurors to fix the fair market value to the bodies and body parts that he stole from the WBP (through Reid) at the amount of $1.5 million, the price that he ultimately received for cadaveric materials from his clients. This was error, argues Nelson, because the payments that he ultimately received from his clients were not simply for dead bodies, but also reflected an input of work that he performed on bodies, e.g., eviscerating bodies (removing the internal organs), or cutting up cadavers into requested parts such as shoulders, knees and spines, and storing bodies and body parts, and delivering cadaveric materials to the end users. In short, Nelson essentially argues that the trial court invited the jury to measure fair market value by his gain after improving the stolen property, rather than by the value of stolen property itself.

According to Nelson, we should view his case as being akin to *People v. Simpson* (1938) 26 Cal.App.2d 223 (*Simpson*). In *Simpson*, defendant stole the magnetos (engine

components) from 12 tractors. At trial, the court overruled defendant's objection to evidence concerning the costs to put magnetos back into the tractors, including labor costs, and, refused defendant's request to instruct the jury that it could not consider the costs of reinstallation in determining the value of the stolen magnetos. On appeal from his grand theft conviction, the Court of Appeal reversed, ruling that that the trial court erred by failing to instruct the jury, in accord with defendant's request, that the fair market value of stolen property was not the total cost of replacing the stolen magnetos, including the cost of labor, but only the value of the stolen magnetos themselves. (*Id*. at pp. 228-229.) The court modified the verdict as to find the defendant guilty of petty theft. (*Id.* at p. 229.) By analogy, says Nelson, in his case the only issue is the value of the dead bodies stolen from the WBP, not the enhanced value obtainable after he did preparation work on the dead bodies.

Nelson's argument is interesting, but it does not persuade us to reverse the jury's finding on the section 186.11 enhancement. The evidence showed that the WBP was in a "chaotic" state when the wrongdoing of Reid and Nelson came to light. It showed that the WBP could not actually determine how many bodies it had received from donors, or disseminated in accord with its standard procedures, or how many bodies had been stolen from its possession. Given the state of the evidence, we agree with Nelson that the record discloses the likelihood that the jury's determined "fair market value" by looking at the money that he had received in the course of his business, i.e., $1.5 million and not by applying some multiplier — e.g., $800 or $3,000 — to a set number of stolen bodies. The jury's question during deliberations shows that the jurors were concerned whether to measure the fair market value of the stolen bodies by focusing on the WBP's loss or by focusing on Nelson's gain. In returning its finding that Nelson's pattern of felony conduct resulted in a taking or loss of property valued at more than $500,000, the jurors likely decided to focus on Nelson's gain, at least to some extent.[5]

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[5] In declining to return findings on the allegations under section 12022.6, subdivision (a)(3), that the property taken exceeded $1 million in value, the jury plainly could not come to a unanimous determination that the full $1.5 million was the fair

Although we recognize the potential problem that Nelson raises, we agree with the trial court's observation that the uniqueness of this case presents more of a factual issue than an instructional issue. Regardless of how the participants in the cadaveric materials marketplace couched their transactions to avoid the prospect of "selling" a body, there is no doubt that the evidence showed that a "marketplace" for cadaveric materials did exist, with values affixed to the materials. The trial court's instructions directed the jurors to determine value by considering the highest price the property would reasonably have been sold for in the open market at the time of, and in the general location of, the theft. This is a correct statement of law and did not preclude Nelson from arguing, as he did, that the jurors should look at value from the position of the WBP's position. At the same time, it was not error for the People to argue to the jurors to find the cadavers had a higher value than that reflected by the WBP's pricing, and the true value was reflected in the marketplace. In the end, we are back to where we started: To the extent that Nelson desired a more pinpoint instruction highlighting that he added some measure of increased value to dead bodies through his special preparation of the dead bodies, it behooved him to request an instruction. Instead, he specifically agreed to the one given. The court's instructions did not reject Nelson's theory of valuation as was the situation in *Simpson, supra*, 26 Cal.App.2d 223, and its instructions otherwise correctly stated the law.

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market value. In other words, in making a finding under section 186.11, subdivision (a)(2), and then declining to make a finding under section 12022.6, subdivision (a)(3), the jury fixed the fair market value of the property taken from the WBP at somewhere between $500,000 and $1 million.

DISPOSITION

The jury's finding that Nelson's pattern of felony conduct involved the taking of, or resulted in the loss by another person or entity of, more than $500,000, within the meaning of section 186.11, subdivision (a)(2), is affirmed.

BIGELOW, P. J.

We concur:

RUBIN, J.

FLIER, J.